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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

| | | |
|--------------------------|---|----------------------------|
| STATE OF ARIZONA, |) | No. P1300CR20081339 |
| |) | |
| Plaintiff, |) | Div. 6 |
| |) | |
| vs. |) | REPLY IN SUPPORT OF |
| |) | MOTION TO PRECLUDE |
| STEVEN CARROLL DEMOCKER, |) | EVIDENCE OF LATE |
| |) | SORENSEN LABORATORY |
| Defendant. |) | FORENSICS TESTING |
| |) | |
| |) | |
| |) | |

Either the State misunderstood the Court's May 12, 2009 discovery order or now seeks to obfuscate the order to evade its disclosure responsibilities. While it is true, as all parties have repeatedly acknowledged, that the State cannot disclose what is not in its possession, that argument is irrelevant to the issues raised in this motion.

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 MAR 10 PM 4:05 ✓

JEANNE HICKS, CLERK

BY: S. FIELDS

1 The State has possessed the nineteen items sent for forensic testing to Sorenson
2 Labs on February 17, 2010 and disclosed to the defense on February 24, since July of
3 2008. The State does not deny this. The State provides no reason why this testing was
4 not requested until over a year and a half after the items were in the State's custody.
5 The Court previously inquired of the State what testing remained to be done and ordered
6 the State to disclose this information. The State advised the Court and counsel at that
7 time that there were fourteen items of evidence that had been sent to the DPS lab and
8 that of those fourteen items, two were being tested by DPS. This representation was
9 made to the Court and to the defense on February 19, 2010. However, it was false and
10 misleading. Two days earlier, nineteen other items had been sent to Sorenson Lab for
11 testing. As the *Newell* court noted, "courts can inquire into the status of pending
12 scientific testing and require, if necessary, regular updates from the State. Once testing
13 is completed, the court may use its discretion to set a deadline for disclosure." *State ex.*
14 *Rel. Thomas v. Newll*, 221 Ariz. 112, 115 (App. 2009).

15 The Court informed the State on May 22 that it had a duty to investigate its case
16 and that additional time would be granted for good cause. No such good cause has been
17 offered by the State. While it is true that the Court cannot order the State to disclose
18 scientific testing which is incomplete, the Court can sanction the State by prohibiting it
19 from performing an intentional end run around the Court, due process and the Rules of
20 Criminal Procedure by waiting until weeks before trial to even request that scientific
21 testing be performed on evidence that has been in its possession for over a year and a
22 half.

23 None of these nineteen items were recently discovered by the State. No good
24 cause for this late investigation has been offered, much less shown to excuse this late
25 disclosure. The State has already had these items examined and has not disclosed
26 (again contrary to the Court's orders) what testing is to be done with respect to each
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1 item of evidence. The State should be prohibited from offering testimony based on the
2 results of any examination of these items given that it is only now retesting them, given
3 that these items have already been tested, given its late disclosure of the testing and
4 given its refusal to identify what testing is being performed in violation of the Court's
5 previous orders regarding disclosure of pending forensic testing.

6 The State also fails to address the separate grounds for excluding DPS experts –
7 namely its failure to disclose in a timely manner the audit reports and protocols that are
8 necessary to examine the thousands of DPS reports until after repeated requests; the
9 DPS lab's failure to comply with the DNA Advisory Board of Quality Assurance
10 Standards for Forensic DNA Testing Laboratories, Standard 14, requiring that labs
11 "shall maintain documentation for the corrective action," and the State's refusal to
12 comply with the Court's order requiring production of STR Frequency Tables. In
13 addition to precluding testimony regarding Sorenson Lab's further testing of these
14 nineteen items, this Court should also preclude testimony from the State DPS experts
15 based on these repeated violations of Court orders and Rule 15.1.

16 Rule 15.7 gives the Court wide discretion in imposing a sanction. The State
17 should not be permitted to thwart the Court's disclosure deadlines by delaying forensic
18 testing requests until mere weeks before a death penalty trial when the Court has been
19 inquiring as to remaining items to be tested and the State offers no cause for the delay.
20 The permitted sanctions under Rule 15.7 include precluding or limiting the calling of a
21 witness, use of evidence or argument; dismissing a case; granting a continuance or
22 declaring a mistrial; holding counsel in contempt; imposing costs; or other appropriate
23 sanctions. In this case, given the cumulative nature of the disclosure violations relating
24 to forensic evidence, the State's failure to disclose the type of testing remaining to be
25 done in violation of the Court's orders and the State's failure to offer any reason for the
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1 delay of a year and a half to request this testing, this evidence should now be excluded
2 under Rule 15.7.

3 **CONCLUSION**

4 Defendant Steven DeMocker, by and through counsel, hereby requests that this
5 Court prohibit the State from offering testimony regarding Sorenson Lab's testing of
6 nineteen items as disclosed on February 24, 2010.

7 DATED this 10th day of March, 2010.

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20 **ORIGINAL** of the foregoing hand delivered for
21 filing this 10th day of March, 2010, with:

22 Jeanne Hicks
23 Clerk of the Court
24 Yavapai County Superior Court
25 120 S. Cortez
26 Prescott, AZ 86303

27 **COPIES** of the foregoing hand delivered this
28 this 10th day of March, 2010, to:

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The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

Joseph C. Butner, Esq.
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